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No. 95-1480

In the Supreme Court of the United States

OCTOBER TERM, 1995

CINDY L. HOTCAVEG AND KEN POTRUE, PETITIONERS

v.

ROGER KENNEDY, DIRECTOR, NATIONAL PARK SERVICE, AND BRUCE BABBITT, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the National Park Service (NPS) reasonably interpreted the National Park System Concessions Policy Act, 16 U.S.C. 20 *et seq.*, to allow NPS to give preference for the renewal of concession contracts only to those existing concessioners who submit bids that meet the minimum requirements set by NPS for the operation of the facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 72 F.3d 133 (Table). The opinion of the district court (Pet. App. 3-8) is reported at 883 F. Supp. 428.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1995. The petition for a writ of certiorari was filed on March 14, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Nearly all goods and services offered to the public within the national parks are provided by private-sector concessioners, pursuant to contracts with the National Park Service (NPS). In 1965, Congress enacted the National Park System Concessions Policy Act (CPA), Pub. L. No. 89-249, 79 Stat. 969 (1965), codified at 16 U.S.C. 20 *et seq.*, in order to provide statutory authorization and standards to govern concession contracting.

The Act provides that

> the Secretary of the Interior shall take such action as may be appropriate to encourage and enable private persons and corporations (hereinafter referred to as "concessioners") to provide and operate facilities and services which he deems desirable for the accommodation of visitors in areas administered by the National Park Service.

16 U.S.C. 20a. The CPA further provides that

> [t]he Secretary shall encourage continuity of operation and facilities and services by giving preference in the renewal of contracts or permits and in the negotiation of new contracts or permits to the concessioners who have performed their obligations under prior contracts or permits to the satisfaction of the Secretary.

16 U.S.C. 20d.

NPS's initial regulation giving preference to existing concessioners required the concessioner "to submit a proposal in response to the fact sheet" issued by NPS, which set forth the requirements for operation of the facility. 36 C.F.R. 51.5(b) (1985). The

concessioner thereafter was given the opportunity to "meet the terms and conditions of the best proposal" received by NPS. *Ibid.* If the concessioner submitted an amended proposal judged by NPS to be at least "substantially equal" to the best proposal, the concessioner would be chosen for the new contract. *Ibid.*

In 1992, the implementing regulations were revised, in part to clarify the way in which an existing concessioner would be given preference. NPS still initiates the process of awarding a contract by developing a prospectus describing "the material terms and conditions under which [NPS] proposes to award the contract." 36 C.F.R. 51.5(b) (1995).* Then, "[t]he concessioner with a right of preference" is "required to submit a responsive offer (a timely offer which the Director determines meets the terms and conditions of the prospectus)." 36 C.F.R. 51.5(c) (1995). If the existing concessioner submits an offer meeting the terms set by NPS but there is another superior offer, the concessioner is given the opportunity to amend its offer; if that amended offer is at least substantially equal to the best offer, and if the existing concessioner is capable of carrying out its terms, the existing contract will be renewed. 36 C.F.R. 51.5(d) (1995). If, however, the concessioner fails to submit an offer meeting the terms set out in the prospectus, "the right of preference shall be considered to have been waived and the contract shall be awarded to the party submitting the best responsive offer." 36 C.F.R. 51.5(c) (1995).

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* The term "prospectus" was substituted for "fact sheet" in order to make clearer to prospective offerors that the process of applying for a concession contract is competitive. 57 Fed. Reg. 40,496 (1992); Pet. App. 22

2. In 1979, NPS awarded petitioners a concession contract to operate the Big Springs Lodge in the Ozark National Scenic Riverways park area. Pet. App. 26-27. That contract was renewed several times, with the last renewal set to expire on December 31, 1994. *Id.* at 28. In March 1994, NPS issued a prospectus setting forth terms for operating the Big Springs Lodge. *Id.* at 29. Specifically, NPS called for improvements to the lodgings and a longer operating day and season. *Ibid.* Petitioners' bid did not satisfy the terms of the prospectus; it instead offered to continue operating under substantially the same terms as before. *Id.* at 30. Because their bid did not indicate that petitioners would agree to the terms of operation or the building and improvement plan required by the prospectus, NPS did not deem it responsive. *Id.* at 32. NPS received another bid that exceeded the prospectus specifications, offering to make all of the required upgrades and to do so in the first year of the contract. The Secretary accepted that bid and notified petitioners that their contract had not been renewed.

3. Petitioners then brought this action to challenge NPS's failure to renew their contract. They argued that NPS's procedures are inconsistent with the CPA's requirement that the Secretary encourage continuity of services by "giving preference" in renewing contracts to existing concessioners. 16 U.S.C. 20d. Applying the familiar principles of deference established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the district court upheld the challenged regulations. The court concluded that NPS's renewal procedures do not "threaten[] continuity," observing that, under the regulations, "concessioners maintain their pref-

erence if they submit a bid which meets the minimum requirements." Pet. App. 7. Recognizing that continuity of operations is not the sole objective of the Act, the court determined that NPS's procedures reasonably harmonize the goal of continuity with other permissible policy objectives. *Id.* at 8.

4. The court of appeals affirmed in an unpublished per curiam order. Pet. App. 1-2.

ARGUMENT

The court of appeals correctly sustained the Secretary's regulations interpreting the CPA. That ruling is consistent with the decisions of this Court and is not in conflict with any decision of another court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 21) that the renewal regulations conflict with the CPA by "eliminat[ing] * * * [the statutory] right of preference." The courts below, however, recognized that the regulations at issue fully conform to and reasonably interpret and implement the Act's terms. The CPA provides that the Secretary "shall encourage continuity of operation * * * by giving preference" in contract renewals to existing concessioners who have satisfactorily performed their obligations. 16 U.S.C. 20d. The challenged regulations plainly give such preference to existing concessioners. Even when a competing offer is determined to be the best offer submitted, an existing satisfactory concessioner who has submitted a bid meeting the minimum requirements for operating the franchise is given an opportunity to amend its offer to meet the terms and conditions of that competing offer. 36 C.F.R. 51.5(d) (1995). If the existing concessioner takes advantage of that opportunity, and its offer as amended is "at

least substantially equal to the best offer and the existing concessioner is capable of carrying out its terms," the existing concessioner is required to be selected for the contract under the amended terms and conditions. *Ibid.*

Nothing in the language of the CPA suggests, let alone demands, that the right of preference must be an absolute right of renewal, regardless of whether the existing concessioner's offer meets the terms of the prospectus. The Secretary is charged with "encourag[ing] continuity," not with ensuring continuity at all costs. Certainly the goal of continuity does not annul the Secretary's statutory obligation to promote the development of facilities that best serve visitors to the national parks. See 16 U.S.C. 20a. Nor does the Act preclude the Secretary from considering a variety of factors in determining which offer best meets the needs of the public. On the contrary, the Act mandates that the Secretary "consider and evaluate *all* proposals received" for operating a concession. 16 U.S.C. 20d (emphasis added). Similarly, the legislative history of the provision makes clear that the preference for existing concessioners is only "[o]ne of [the] factors" to be taken into account when awarding a contract. S. Rep. No. 765, 89th Cong., 1st Sess. 19 (1965); Pet. App. 36. As the district court observed, the regulation represents a reasonable balancing of the interest in continuity and the interest in "[r]equiring concessioners to meet minimum standards to improve the quality of facilities in national parks." Pet. App. 8.

Petitioners also contend (Pet. 18-21) that the lower courts failed to consider whether the plain language of the Act precludes the regulation adopted by the Secretary. However, the district court expressly ad-

dressed and rejected petitioners' argument that the regulation "is in direct contradiction with [the CPA] and [is] therefore a direct violation of the statute." Pet. App. 7. The court concluded that the statutory language directing that continuity "shall be encouraged" does not conflict with the renewal regulation, which allows concessioners to "maintain their preference if they submit a bid which meets the minimum requirements." *Ibid.*

2. Petitioners quarrel with the deference accorded by the courts below to the Secretary's implementation of the Act, arguing that when an agency changes its interpretation of a statute, the new interpretation is not entitled to *Chevron* deference unless the agency acknowledges and explains the reasons for the change. Pet. 6-14. That argument is incorrect.

First, the regulations at issue represent not a change in NPS's interpretation of the Act, but merely a clarification of how the Act's right of preference for existing concessioners is to be implemented. Under the prior regulation, a concessioner was "required to submit a proposal *in response to* the fact sheet" issued by NPS. 36 C.F.R. 51.5(b) (1985) (emphasis added). The revised regulation explains what is meant by a responsive proposal, defining it as "a timely offer which the Director determines meets the terms and conditions of the prospectus." 36 C.F.R. 51.5(c) (1995). Thus, the regulation clarifies that "an existing satisfactory concessioner, although enjoying a right of preference to the renewal of the concession contract or permit, is nonetheless required to submit a responsive offer" to NPS. 56 Fed. Reg. 41,895 (1991). And by making explicit the consequence of a failure to submit a responsive bid—*i.e.*, waiver of the right of preference—the regulation now clarifies in

what sense the concessioner is "required" to submit such a bid.

Second, even if the regulation represented a change in the agency's position, deference would be warranted by virtue of the reasonableness of the agency's interpretation of the Act and its implementation of the preference. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-814 (1995) (quoting *Chevron*, 467 U.S. at 844). This Court has squarely rejected the argument that an agency's changed position is not entitled to deference. *Rust* v. *Sullivan*, 500 U.S. 173 (1991); see also *Chevron*, 467 U.S. at 863 ("An initial agency interpretation is not instantly carved in stone."). Indeed, in *Chevron* itself, the agency had adopted a changed definition of a "statutory source" under the Clean Air Act, and that changed interpretation was accorded deference. *Id.* at 863-864.

An agency, in light of different circumstances, is free to alter the interpretive and policy views reflected in its construction and implementation of an underlying statute, so long as the agency's new approach is consistent with express congressional intent and is based on a permissible reading of the statute. See *Chevron*, 467 U.S. at 864-865. The fact that an agency has changed its interpretation of a statute "might reduce, but [does] not eliminate, the deference [a court] owe[s] [to the agency's] reasoned determinations." *NationsBank*, 115 S. Ct. at 817. Here, as explained above, the renewal regulation does not represent a new intrepretation of the Act; it is,

moreover, based on a permissible reading of the Act and is consistent with its policy. The lower courts therefore correctly deferred to the agency's approach.

To the extent that explanation is required for the revision of the renewal regulations, the Secretary amply justified the change with a "reasoned analysis." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). When NPS proposed the revisions, it noted that one of the purposes was to "enhance competition in the award and renewal of concession contracts." 56 Fed. Reg. 41,894 (1991). To that end, the proposal stated that "[t]he right of preference in the renewal of concessions contracts will continue with procedures that provide for expanded opportunity in concession contracting." *Ibid.* The reasons for new procedures were elaborated in the *Federal Register* notice accompanying the final regulation revising 36 C.F.R. 51.5(b) (1985). NPS determined that, despite the statutory requirement that the Secretary consider all offers for a concessions opportunity, "there have only been a handful of instances (involving small operations) when an existing satisfactory concessioner was not awarded a new contract." 57 Fed. Reg. 40,496 (1992). The notice explained that the new procedures were designed to address that problem, by clearly "requiring existing concessioners to satisfy the terms and conditions of a prospectus," thus encouraging competitors to submit offers for concessions contracts. *Id.* at 40,500-40,501. The *Federal Register* notice also explained that the revised procedures better implement Congress's intent: "If existing concessioners submitted unresponsive offers and retained their rights of preference, they would be in a position to frustrate [NPS's ability to determine

under what terms a concession will be operated.] This clearly is not Congressional intent under the Act." *Id.* at 40,501. Petitioners' suggestion (Pet. 14-17) that this extensive explanation is not "reasoned" is simply wrong.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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